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JUDGMENT

Bulakiram
vs.
Sushila Devi

S.B.CIVIL SECOND APPEAL NO.123/2006
UNDER SECTION 100 CPC AGAINST THE
JUDGMENT AND DECREE DATED 15.12.2005
PASSED BY SHRI SURENDRA MOHAN SHARMA,
ADDITIONAL DISTRICT JUDGE NO.2,
BIKANER IN CIVIL APPEAL NO.38/2005.

DATE OF JUDGMENT ::: 22.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. MS Purohit, for the appellant.

Mr. RR Nagori, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

Brief facts of the case are that the plaintiff/landlord filed suit for eviction of her tenant/appellant/defendant on various grounds but thereafter abandoned her other grounds and proceeded with the suit only on the ground of default committed by the

tenant in payment of the rent. So far as determination of rent is concerned, there is no dispute. Rent was determined by the trial court and the tenant committed default in payment of rent during the pendency of the suit, therefore, the defence of the defendant was struck off. The plaintiff did not give her statement in the trial court but produced the affidavits of PW1 Mathura Das and PW2 Inder Kumar. Both these witnesses were not cross examined by the defendant even when opportunity was given. The appellant/defendant also did not submit his affidavit to rebut the evidence of the plaintiff.

The trial court decreed the suit of the plaintiff vide judgment and decree dated 28.7.2004 against which the defendant/appellant preferred appeal wherein he submitted that no sufficient opportunity was given to the appellant to cross examine the plaintiff's witnesses and he was not given opportunity to produce evidence. The first appellate court observed that opportunity was given to the defendant to cross examine the plaintiff's witnesses but it was submitted on behalf of the appellant himself that the appellant does not want to cross examine the witnesses and also do not want to produce submit any evidence. This order-sheet has been signed by learned counsel for the appellant before the trial court. In view of the above, there was no rebuttal evidence of the plaintiff on the question of default committed by the appellant. Accordingly, the first appellate court dismissed the appeal of the appellant vide judgment and decree dated 15.12.2005.

Learned counsel for the appellant vehemently submitted that the plaintiff herself did not appear in the witness box to prove the initial default alleged to have been committed by the appellant before filing of the suit. It is also submitted that this Court in the judgment delivered in the case of *Sikhar Chand (now dead) through LRs. vs. Santi Kumar and another* reported in 2002(1) WLC (Raj.) 537, has dismissed the suit of the plaintiff because of non-appearance of the plaintiff in the case of allegation of default. It is also submitted by learned counsel for the appellant power of attorney of the plaintiff cannot be a competent witness, which is also held by this Court in the aforesaid judgment.

Learned counsel for the appellant further relied upon the judgment of the Hon'ble Supreme Court delivered in the case of *Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others.* reported in AIR 2004 SCW 7064 wherein the Hon'ble Apex Court held that the power of attorney holder cannot be posed and placed instead of principal.

I have considered the submissions of the learned counsel for the appellant and perused the facts of the case also.

So far as non-appearance of the plaintiff in this case is concerned, is neither fatal nor any adverse inference can be drawn against the plaintiff because of the simple reason that the defendant himself in his written statement categorically stated that PW1 Mathuradas was the authorised

person of the plaintiff to receive the rent on behalf of the plaintiff. The plaintiff produced said Mathuradas in evidence and who clearly stated that the rent has not been paid by the tenant to him for payment to the plaintiff. Said witness Mathuradas did not cross examine by the defendant obviously because of the reason that the defendant did not want to dispute the statement of said Mathuradas about allegation of default committed by the appellant. It is not a case where the fact of default was only in the personal knowledge of the plaintiff herself rather say the more proper witness was PW1 Mathuradas in this case. Mathuradas had full knowledge of the facts of the case and, therefore, was competent witness and the plaintiff did not appear merely because of the reason that she had some power of attorney who was authorised to depose on behalf of the plaintiff. In view of the above, the judgments relied upon by learned counsel for the appellant has no application to the facts of the case.

Accordingly, I do not find that any substantial question of law arises in this appeal, therefore, this appeal deserves to be dismissed.

At this stage, learned counsel for the appellants prayed that two years' time may be granted to vacate the suit premises as the suit premises is a shop and the appellant is doing his business since long and he will have to make alternative arrangement and in case time is not given, his entire business will be ruined.

Looking to the totality of the facts, this Court deems that the appellant be granted one year's time to vacate the suit shop.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.5.2007 and shall not part with the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decretal amount, if due, within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.6.2007. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court.

In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

with the aforesaid concession, this appeal is dismissed.

S. Phophaliya

(PRAKASH TATIA), J.